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No. 97-930

In The
Supreme Court Of the United States
October Term 1997

VICTORIA BUCKLEY, Colorado Secretary of State
Petitioner

v.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., *et al.*
Respondents

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE AND PROPOSED *AMICUS CURIAE* BRIEF OF NATIONAL VOTER OUTREACH, INC., IN SUPPORT OF RESPONDENTS

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June 17, 1998

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Movant National Voter Outreach, Inc. ("NVO"), respectfully moves for leave to file the attached brief *amicus curiae* in support of Respondents. Counsel for Petitioner and Paul Grant, Esq., counsel for some respondents, have consented to the filing of this brief, but Counsel of Record for other respondents, Neil O'Toole, Esq., has denied consent.

NVO, a Nevada corporation, is a political consulting firm specializing in organizing signature drives to qualify issues and candidates for ballots nationwide. NVO officials have been at the forefront of all major initiative campaigns that have swept the Nation in the past fifteen years, including: term limits for elected officials, tax, tort and malpractice reform, gaming and lotteries, and educational reform and school choice. A decision in this case will directly affect NVO, its employees and contractors, and the signature drives it organizes.

NVO has conducted over 150 separate, successful signature drives in thirty-six states and Washington, D.C., organizing the collection of more than eighteen million signatures. NVO was the principal organizer in some of the initiative measures at issue in this case. *See, e.g.*, Joint Appendix ("Jt. App."), P. 35.

The briefs filed by Petitioner and the various governments supporting her suggest that professional signature collection is responsible for numerous failings in the initiative process. NVO has consulted with Respondents' counsels and believes that Respondents will not be addressing these points to the degree necessary for proper resolution of this case.

NVO is the largest organizer of paid petition circulation drives in the United States, and believes that its experience and information about the issues in this case will provide a perspective not offered by any party. For example, NVO can illustrate how the parties and the courts below failed to identify the proper standard of review, and how the current and future practices of the petition circulation industry are different from those assumed by the parties and the courts below.

Therefore, NVO respectfully prays the Court to grant it leave to file the attached brief *amicus curiae*.

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On Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL VOTER OUTREACH, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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June 17, 1998

QUESTION PRESENTED

Whether the State of Colorado may constitutionally regulate the process of circulating initiative petitions by requiring that: (1) petition circulators who verify the signatures of petition signers[1] must be registered electors; (2) petition circulators must wear identification badges; and (3) proponents of an initiative must file reports disclosing the amounts paid to circulators and the identity of petition circulators.

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[1]Petition circulators do not "verify the signatures of petition signers." Verification is conducted solely by Petitioner herself. C.R.S. §§ 1-40-116, 117. Circulators have neither the information nor authority to verify the validity of signatures.

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INTEREST OF AMICUS CURIAE

Amicus National Voter Outreach, Inc. ("NVO"),[2] is a political consulting firm specializing in organizing signature drives to qualify issues and candidates for the ballot throughout the United States. NVO officials have been at the forefront of all major national initiative campaigns in the past fifteen years, including: term limits for elected officials, tax, tort and malpractice reform, gaming and lotteries, and educational reform and school choice.

NVO has conducted over 150 separate, successful signature drives in thirty-six states and Washington, D.C., organizing the collection of more than eighteen million signatures. NVO was the principal organizer in some of the initiative measures at issue in this case. *See, e.g.*, Joint Appendix ("Jt. App."), P. 35. A decision in this case will directly affect NVO, its employees and contractors, and the signature drives it organizes.

PRELIMINARY STATEMENT

Signature collection is not easy. Sponsoring organizations must find qualified circulators to stand on busy street corners asking total strangers to sign a document which will be forwarded to the government

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[2] Pursuant to Rule 37.6, *amicus* NVO certifies that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that counsel for *amicus* wrote this brief without assistance from any other counsel.

for verification.[3] A reporter who tried circulating petitions in California recently wrote: "I must have made 10 attempts without a strike [signature]. And with each failure, the more tentative I grew." Howe, "Big Money Swamps the Ballot," *San Francisco Chronicle*, May 19, 1998, A1.

Circulating petitions is "work. . . time-consuming and it is tiresome – so much so that it seems that few but the young have the strength, the ardor, and the stamina to engage in it, unless, of course, there is some remuneration."[4] *Meyer v. Grant*, 486 U.S. 414, 423-24 (1988), *citing Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983) and *State v. Conifer Enterprises, Inc*, 82 Wash. 2d 94, 104, 508 P.2d 149, 155 (1973)(Rosellini, J., dissenting).

As this suggests, very few modern initiatives would qualify for the ballot without paying circulators. *Meyer v. Grant*, 486 U.S. at 423-24 (limits on paid petition circulation "makes it less likely that [initiative proponents] will garner the signatures necessary to place the matter on the ballot, thus

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[3]Some initiative proponents want to minimize the effort to find volunteer circulators by seeking initiative signatures by mail, but that cannot be done in Colorado, where circulators must swear before notaries about the validity of the signatures, C.R.S. § 1-40-111(2).

[4]It is even difficult for "young, outgoing and politically committed" circulators to gather signatures. Howe, May 19, 1998. "After a couple of hours, your brain turns to Jello, said [circulator Christopher] Dunn. "You're always jumping from talking to idiots to engaging in graduate school discussions. Plus you're constantly dealing with people rejecting you." *Id*.

limiting their ability to make the matter the focus of statewide discussions.).

Yet paid signature gathering is not a significant portion of modern initiative budgets. Signature collecting (including surveys and polling) accounted for only seven percent of the expenses of the top California initiatives in the last 40 years. Howe, May 19, 1998. Advertising took more than two-thirds of the money spent on these initiatives. *Id*.

Nevertheless, a substantial portion of Petitioner's and supporting briefs represents complaints about paid petition circulation, *see, e.g.*, Petitioner's Brief ("Pet. Br."), 18-24, 31-33, 35-42; *Amici Curiae* Brief of Council of State Governments, *et al*. ("*Amici* Council Br."), 2-12, even though that issue was settled in *Meyer v. Grant*, 486 U.S. 414 (1988). "The concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might otherwise have failed cannot defeat First Amendment rights." 486 U.S. at 426 n. 7. Limits on paid petition circulation violate the First Amendment by limiting the political speech of initiative circulators and proponents and lessening the chances that the proponents will garner sufficient signatures to place the matter on the ballot. 486 U.S. at 422-23.

Petitioner and *amici* have this case backwards when they blame paid petition circulators for a host of alleged ills in the initiative process. Paid petition circulation has not stripped the initiative process of its "democratic essence." *Amici* Council Br. 11. The initiative process requires substantial sums of money and professional assistance precisely because state

regulation and procedures are so burdensome and the number of signatures required are so large.

For example, the initiative process is not tolerant of errors. Petitioner operates under a "perfect match" system in which signatures must match her files, even if her files are incorrect or incomplete. *McClellan v. Meyer*, 900 P.2d 24, 31-32 (Colo. 1995)(describing Petitioner's rejection of signatures because, *inter alia*, signers included or omitted an apartment number or street directional (*i.e.*, "N.W.") or accurately described newly-annexed cities by their new names). Petitioner has discarded signatures because petitions had too many staple holes, *Committee for Better Health Care for All Colorado Citizens v. Meyer*, 820 P.2d 884, 888 (Colo. 1992), and because signers omitted the designation of Jr. or Sr., *McClellan*, 900 P.2d at 33-34, even though Colorado doesn't recognize the designation as part of a name. *Id.*, 900 P.2d at 36 (Mullarkey, J., concurring in part and dissenting in part).

In addition, the modern circulation requirements of every State (except Michigan) can be met only by circulators with expertise in computerized processing and verification. For example, Colorado requires all signature forms to be "machine-readable" or "scannable" and circulators must use black ink. *See, e.g.*, Jt. App. 18 ("USE BLACK INK! Computerized scanners will pick up the information more easily."); Meyer, Secretary of State, *Initiative and Referendum Instruction Manual*, June 1993, 5 ("PRINTERS SHOULD USE PMS 310U [black ink] FOR REPRODUCTION OF SIGNATURE PAGES.").

Amicus NVO is adapting new technology which will, if the States agree, permit petition signers to enter their signatures on portable electronic equipment. This technology is already in use by express shipment companies and large department stores, where paper forms are no longer required. The equipment will digitize the signatures, electronically transmit the information and signature to the State, and instantaneously receive a response from the State as to whether the signature and other information is valid.[5]

Since every state except Michigan has computerized their voter signature verification records, this type of technological expertise is increasingly required to participate in petition signature collection. The advantages accrue to the voters (whose signatures will be more likely to be counted), to the government (which will be able to verify signatures more easily in their computerized

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[5]This evolution highlights the point, made in more detail below, that it is the **State** which verifies the information, so that the circulator does not play the asserted "critically important role in insuring that only valid signatures are collected." Petitioner's Brief ("Pet. Br."), 25. The circulator is not required to verify the validity of signatures; the circulator's affidavit at issue in this proceeding only demonstrates the circulator's belief in the signature's validity. C.R.S. § 1-40-130(1)(d); *Loonan v. Woodley*, 882 P.2d 1380, 1390 (Colo. 1994)(en banc)(only the "subjective belief of the circulator."). Until the circulator has instant access to the State's files, the circulator cannot verify the information provided by a petition signer, and consequently the circulator's affidavit that the information is genuine, C.R.S. § 1-40-111(2), is largely an empty gesture.

files), to proponents (who will have more control over the number of signatures to be collected, and will be under less pressure to over-collect signatures) and to circulators (who do not get paid for invalid signatures). The disadvantage is that the expertise and equipment required are expensive, and experienced professionals will probably be needed even more in the collection phase.

The vast volume of signatures required by percentage thresholds based on today's enormous populations demands professional assistance to capture sufficient valid signatures within the tight deadlines imposed by State laws. In Colorado, for example, petition circulation can take no more than six months, C.R.S. § 1-40-108, and that period can be reduced considerably by numerous legal challenges to ballot and petition language.[6]

Paid circulators are simply better at gathering signatures in a short period of time. *See, e.g., Term Limits Leadership Council v. Clark*, 984 F.Supp. 470, 472-73 (S.D. Miss. 1997)(paid circulators averaged 3057 signatures per circulator while volunteer circulators averaged 251 signatures per circulator).

Petitioner's and *amici*'s concerns about the number and type of initiatives are similarly overstated. Both Petitioner and *amici* make much of

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[6]Sometimes this procedure can cost proponents several months of possible circulation time. *In the Matter of Proposed Initiative on Trespass - Streams With Flowing Water*, 910 P.2d 21, 30 (Colo. 1996)(Mullarkey, J., dissenting)(procedure can be a weapon in the "arsenal of those who wish to attack a proposed initiative on procedural grounds").

the fact that the number of initiatives have increased[7] since this Court permitted payment to circulators in *Meyer v. Grant*. Pet. Br., 18; *Amici* Council Br., 18.

In fact, the number of initiatives has always been very small.[8] Schmidt, 39. Only 106 initiatives were qualified for the ballot nationwide in 1996. *Amici* Council Br., 5, n. 5.

Even California, arguably one of the most active initiative states, had only five citizen-initiated measures on the June 2, 1998, ballot. California Voter Foundation, "Ballot Measures," *California Online Voter Guide - 1998 Primary*, June 2, 1998, http://www.calvoter.org/98primary/measures.

Amici Council of State Governments are also concerned that "the initiative and referendum has over time, and particularly in the past 15 years,

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[7]From the beginning of the initiative process through the Depression, initiatives were relatively common. David D. Schmidt, *Citizen Lawmakers*, 1989, 24. In 1914, there were 90 initiatives on ballots nationwide, almost as many as today, even though fewer states then had the initiative process. *Id.*, 20. During and after World War Two, the overall number of initiatives nationwide was far lower. *Id.*, 21.

[8]"Even where Initiative use is highest, laws passed by Initiative represent less than 1 per cent of the total number enacted." Schmidt, 39. Kershner, "Democracy Gone Awry," *San Francisco Chronicle*, May 18, 1998, A1 (of 956 initiatives circulated in California since 1912, only 85 passed); *see also*, Germond and Witcover, "California's At It Again," *National Journal*, May 16, 1998, 1144 (of about 300 initiatives submitted in the past 10 years, only 85 have qualified for the ballot and only a handful have been approved.").

'slipped away from the citizens it was invented to serve into the hands of the very kind of wealthy special interests it was meant to contain.'" *Amici* Council Br., 3 (citation omitted). Yet as Professor Elisabeth Gerber says, "big money can block, but it can't pass." Howe, May 19, 1998.

Recent initiatives are not primarily beneficial to "wealthy special interests."[9] The ballot measures on the June 2, 1998, California ballot included limiting labor union political activity, reducing educational administrative costs, ending bilingual education, prison sentencing and parole, competitive bidding on state contracts, judicial discipline, and term limits. California Voter Foundation, *supra*.

Voters support the initiative process; a recent Field Poll in California found that "by 74 percent to 7 percent, the public thinks the initiative process is a good thing." Kershner, May 18, 1998. "Even though special interests are affecting the initiative process, people see the same problems with the Legislature and are even more distrustful." *Id.*

The voters can be trusted to evaluate the relative merits of conflicting arguments. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978). If

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[9]Even if these initiatives were to promote the interests of those who can afford to pay seven percent of their budgets to hire professional circulators, this Court has already explicitly rejected the idea that Colorado can limit political speech on this ground. *Meyer v. Grant*, 486 U.S. at 426 n. 7 ("paid advocacy 'may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.'", *citing First National Bank of Boston v. Bellotti*, 435 U.S. at 790-91).

governments are concerned that voters will be swayed by the arguments of slick professionals, their remedy is to speak themselves and convince the voters of the wisdom of their views. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)(state's concern over voters' "ill-advised" choice does not justify speech restrictions).

These factors demonstrate the logic of an initiative proponent's decision to seek professional assistance in completing a difficult task in a short period of time. The high stakes – risking substantial sums of money and months of work on the possibility that a form has too many staple holes – are the primary incentives driving the professionalization of the initiative process.

Initiative proponents, who care deeply about the topics of their initiatives, and who have lost faith in the legislative and executive branches of government to remedy their concerns, should not be relegated to relying on untrained help when the risks are so high and the chances for error under complex rules so great.

SUMMARY OF ARGUMENT

Standard of Review:

Petitioner suggests the standard of review of this case should be flexible because petition circulators are part of the **electoral** process. In fact, under Colorado law, initiative petitions are not ballot materials, and the electoral process does not begin until Petitioner herself has verified the signatures and qualified the initiative for the ballot. Petition circulation is purely private speech.

Petitioner also suggests that flexible review is warranted because private circulators are, in essence, agents of the State as part of the initiative process. In fact, under Colorado law, petition circulation is a purely private matter, and the only verification which matters is that done by the State itself. Circulators' affidavits of signatures' validity are recognized in Colorado **solely** to insure that circulators are aware of their responsibilities; circulators and signers are exercising their personal speech rights rather than any state action.

This case is about the regulation of private speech, an area in which state regulation is suspect. The correct standard of review is that of regulations which impinge on core political speech in traditionally public fora: strict scrutiny.

No Compelling Interest or Rational Basis:

Petitioner asserts four rationales to support her regulations: administrative efficiency; protecting voters from improper or inadequate speech (*i.e.*, content discrimination); avoidance of fraud; and assisting voters in the initiative process. None of these rationales demonstrate a compelling interest or rational basis in regulating circulators' speech because Petitioner's assertions are unsupported by the modern practice of initiative petition signature gathering and verification.

The three regulations at issue here do not advance Petitioner's asserted interest in administrative efficiency. The only verification which matters is Petitioner's; the registration, reporting

and badge requirements simply add complexity with no effect on determining signatures' validity.

Similarly, the three regulations limit political speech by content – most notably by requiring private speech to carry the government's message – when the government should be speaking itself. None of the three regulations add anything to the political debate in Colorado except to express the State's displeasure at paid petition circulators.

Nor are Petitioner's regulations needed to protect against fraud. Existing anti-fraud provisions have not changed since they were recognized in *Meyer v. Grant*, and paid petition circulators, in particular, have powerful economic incentives to prevent fraud.

And Petitioner cannot justify her regulations as necessary to protect the voters, since they fall most heavily on those who wish to advocate political change in Colorado, without benefit to other voters. The voter registration requirement, for example, prevents hundreds of thousands of Coloradans from exercising core political speech, yet Petitioner makes no mention of the effect of her regulations on these third parties.

The regulations violate free speech and should be struck down.

ARGUMENT

I. THE APPROPRIATE STANDARD FOR REVIEW IS STRICT SCRUTINY OF STATE REGULATION OF PRIVATE INDIVIDUALS' CORE POLITICAL SPEECH:

A) Petitions Are Not Ballots and This Case Involves The Regulation of Private Speech, Not the "Electoral Process:"

Petitioner asserts that this case involves "the regulation of the electoral process". Pet. Br., 17. But simply asserting that the procedures are "designed to protect the integrity of the State's **initiative** process" does not make signature collection part of Colorado's **electoral** process.[10]

The speech regulations at issue in this case apply solely to the circulation of initiative petitions. Colorado law says that "initiative petitions are not election materials." C.R.S. § 1-40-114.[11]

The Colorado statute stating that initiative petitions are not election materials was enacted after the decisions in *Montero v. Meyer*, 861 F.2d 603, 609 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989)("Under the Colorado Constitution, one who circulates an initiative petition exercises an individual right solely for the circulator and not for the state") and *Delgado v. Smith*, 861 F.2d 1489, 1497 (11th Cir. 1988), *cert. denied*, 492 U.S. 981 (1989)("It is only after a petition is successfully

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[10] *See, e.g., Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996)("The 'governmental hindrance' referred to in *Delgado* [*v. Smith*, 861 F.2d 1489 (11th Cir. 1988)] is not the state's regulation of its initiative process in general, but rather burdens on the petition circulation aspect of that process in particular").

[11] *Petitions - Not Election Materials - No Bilingual Language Requirement.* The general assembly hereby determines that initiative petitions are not election materials or information covered by the federal "Voting Rights Act of 1965", and therefore are not required to be printed in any language other than English to be circulated in any county in Colorado." C.R.S. § 1-40-114.

subscribed to that it becomes a matter to be put to a vote – a part of the electoral process.").

In *Montero*, the Tenth Circuit said:

> We therefore conclude that the "electoral process" to which the minority language provisions of the [Voting Rights] Act apply does not commence under Colorado law until the Secretary of State certifies the measure is qualified for placement upon the ballot, and that signing of an initiated petition is not "voting."

861 F.2d at 607.

There is an important policy rationale for this distinction: the initiative petition may never enter the electoral arena, yet it may still be effective to "achieve political change in Colorado." *Meyer v. Grant*, 486 U.S. at 421. This can be illustrated in one of 1998's most controversial initiative battles: "paycheck protection" or "workers' rights." *See, generally*, Broder, "Calif. GOP's Bid to Curb Union Funds Is Faltering," *The Washington Post*, May 26, 1998, A1.

Faced with polls showing overwhelming support for a California initiative which would require prior consent for payroll deductions for political spending, labor unions drafted a "counter-initiative that would have curbed businesses' political contributions. Rather than file it, they took it into negotiations with the state Chamber of Commerce and emerged with an agreement that business would not put its muscle

behind" the prior consent initiative.[12] Broder, May 26, 1998, A5, col. 3.

A similar scenario just played out in Nevada, where "paycheck protection" proponents withdrew their initiative in an agreement to block a counter-initiative. Benjamin, GOP drops dues initiative, reaches accord with unions," *Las Vegas Review Journal*, June 17, 1998, URL: http://www.lvrj.com/lvrj_home/1998/Jun-17-Wed-1998/news/7695188.html.

As these episodes demonstrate, initiatives that are not yet filed and qualified for the ballot are simply a political activity. The State has no role:

> The State does not initiate the petition, does not draft the language of the petition, does not address the merits of the proposal and does not participate in any way in the circulation of the petition or in the collection of signatures. Rather, all of this action is taken by private citizens. The state's responsibility is to ensure that the petition meets the requirements of law and will fairly present the proposition that may or may not be placed before the electorate. Such regulation is not sufficient to transpose such private conduct into state action.

Delgado v. Smith, 861 F.2d at 1497.

Nor does this political speech look like an "electoral process." No "voting" occurs at this stage. *Montero*, 861 F.2d at 607; *Delgado*, 861 F.2d at 1493.

Indeed, voting may never occur on an initiative proposal. Proponents may choose not to proceed at any stage of the initiative process – even after collecting signatures sufficient to qualify the initiative for the ballot – and the election machinery of the State will not be implicated. There is no penalty for proponents who choose to halt or divert their political efforts short of ballot qualification. *Montero*, 861 F.2d at 609.

Thus, unless and until initiatives are verified by the State and the measure is qualified for the ballot, the initiative process is just like any other form of protected political speech. It is not part of the "electoral process." Petitioner cannot justify her regulations under a flexible standard on this ground.

B) Private Petition Circulators Are Not Government Employees, and This Case Involves Private, Not Government, Speech:

Petitioner and *amici* also argue that private circulators have been, in effect, "deputized" to perform important State functions.[13] "Deputizing"

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[12]These political negotiations apparently were successful. Kasindorf, "Bilingual Education Ban Faces Lawsuit," *USA Today*, June 4, 1998, 1A, col 5 ("U.S. Chamber of Commerce official Bruce Josten said union threats of retaliatory legislation intimidated businesses from taking a more active role in favor of the measure."). Without business support, the "paycheck protection" initiative failed. California Secretary of State, *State Ballot Measures*, http://primary98.ss.ca.gov/Returns/prop.

[13]*See, e.g.:* Petitioner's Brief ("Pet. Br.") 24-25 (". . . the affidavit requirement which reflects the important

(continued...)

circulators places them closer to government, increasing government's power to direct their speech.

The threshold step in any First Amendment speech analysis is to identify the speaker. This Court's unconstitutional conditions precedents lie on a "speech spectrum" ranging from private persons to government employees. *Board of County Commissioners v. Umbehr*, __ U.S. __, __, 116 S.Ct. 2342, 2350 (1996).[14] Government's power over a person's speech depends on the speaker's proximity to government; the closer to government, the greater government's interest in the speech. *Id.*; *Rosenberger v. Rector and Visitors of Univ. of Va.*, __ U.S. __, __, 115 S.Ct. 2510, 2518-19 (1995); *Rust v. Sullivan*, 500 U.S. 173, 192-96 (1991).

The problem with asserting this power over circulators' and signers' speech is that the speech is not the government's. The State is not the speaker, nor has it enlisted or paid the circulators to convey

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[13](...continued)
administrative role petition circulators play in the initiative process."); 25 ("circulators serve a critically important role in insuring that only valid signatures are collected.")(citations omitted).

[14]This speech spectrum ranges from "government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to . . . users of public facilities . . . and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 116 S.Ct. at 2350.

its own message. As shown above, these messages are solely private; the State has no role.

Even the petitions are not government speech, since they are neither government property, nor effective until qualified for the ballot. *Montero v. Meyer*, 861 F.2d at 607; *Delgado v. Smith*, 861 F.2d at 1497. If the circulators withdraw the measure before qualification, "the state can do nothing to effect the initiated measure." *Montero*, 861 F.2d at 609.

The circulators on the streets and the people who sign petitions are actively engaged in "core political speech" in traditionally public fora. *Meyer v. Grant*, 486 U.S. at 422. The only true effect of Petitioner's regulations is on the pure speech of the circulators and the signers.

Thus, Petitioner's characterization of the standard for review is wrong on two grounds: this is not an "electoral" case but a pure speech one; and the speech is purely private, rather than that of a person associated with some governmental function. The appropriate standard of review for this case is that used for State regulation of core political speech in traditionally public fora: strict scrutiny.

II. The State Cannot Show a Compelling Interest or Rational Basis to Regulate Circulators' Political Speech:

A) These Regulations Do Not Advance Petitioner's Interest In Administrative Efficiency:

Petitioner asserts "circulators serve a critically important role in insuring that only valid signatures

are collected." Pet. Br. 25. Yet it is Petitioner's own signature verification process which is "to maintain integrity in the initiative process." *Fabec v. Beck*, 922 P.2d 330, 335 (Colo. 1996)(en banc).

The validity of petition signatures is generally not within circulators' knowledge or control. The only function of the circulator's affidavit of validity is to assure "the circulators were aware of their important role in implementing all of the statutory safeguards and in assuring the validity of the signatures they collect." *Loonan v. Woodley*, 882 P.2d 1380, 1385 (Colo. 1994). No matter how strenuously a circulator attests to the validity of a signature, Petitioner is required to perform her own verification and proceed accordingly. C.R.S. § 1-40-116(2).

Using her computerized system, it is Petitioner herself who verifies signatures. *Id.* Petitioner has the information necessary to verify electors' current addresses, signatures, and other authentication information. Circulators do not; until they have access to Petitioner's files, they know only what appears before them on a busy street corner.

This reliance on circulators' affidavits is not necessary now that virtually every initiative State verifies the petition signatures presented by the circulators. 19 States perform actual verifications of signatures against voter rolls.[15] Nat'l Voter Outreach,

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[15]Arkansas, Arizona, Arkansas, California, District of Columbia, Florida, Idaho, Illinois, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, Ohio, Utah, Washington, and Wyoming. Some states combine verification

(continued...)

1998 Essential Elements for Initiatives, 1. Eight perform statistically-valid random sample verifications.[16] *Id.* Only two states, Oklahoma and South Dakota, presume signatures are valid if the circulator provides a notarized affidavit. *Id.*

Colorado uses both scientific random sampling and actual verification of each signature to determine the validity of signatures. C.R.S. §§ 1-40-116(4), 1-40-117. Only the Secretary of State's verification matters. If the Secretary deems the signatures invalid, the signature is not counted, no matter what the circulator's affidavit says. C.R.S. § 1-40-116(3).

There are many instances in which signatures were invalidated for failure of the circulator or a notary to follow the Secretary's complicated rules. For example, courts have had to rule on the reasons petitions had too many staple holes, *Committee for Better Health Care*, 820 P.2d at 888, use of pens by notaries, *Fabec v. Beck*, 922 P.2d at 342 n. 6, whether the judge recognized particular notaries' handwriting, *id*, 922 P.2d at 345, and whether Petitioner's list of cities could be used even though it was not current or accurate. *McClellan v. Meyer*, 900 P.2d at 32.

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[15](...continued)
methods.

[16]Arizona, California, Colorado, District of Columbia, Michigan, Nevada, North Dakota, and Oregon. If the random sample falls short of a pre-determined level, the State examines the validity of all signatures. In Colorado the level is between 90% and 110% of the number of signatures needed to qualify for the ballot. C.R.S. § 1-40-116(4).

In these cases, it simply didn't matter what the circulator's affidavit said. The only legally-effective "protection" of the integrity of the initiative process was the Secretary's, not the circulator's affidavit of belief or good faith. The effect of the Secretary's actions, however, was to cut off the speech – the "expression of a desire for political change" (*Meyer v. Grant*, 486 U.S. at 421) – of the signers.

The injury here is to both the circulator and the voters whose signatures are not counted because of a procedural error. Under the regulations at issue in this proceeding, the circulator is forced to speak in a fashion which has no relationship to the interests allegedly protected by the circulator's "critical" role in the initiative process. Voters' speech in favor of political change – signatures on petitions – is discarded in support of an affidavit whose sole role is circulators' unsupported subjective beliefs. This is neither compelling nor rational.

B) Petitioner's Regulations Cannot Be Justified on the Basis of the Content of Circulators' Speech:

Similarly, since Petitioner's regulations affect only private political speech in traditionally-public fora, they cannot be justified on the basis of protecting voters from hearing the "wrong" political speech. *Meyer v. Grant*, 486 U.S. at 426 n. 7, *citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978). Yet that is what *Amici* Council of State Governments say: "signature solicitation is often more akin to hucksterism than political discourse." *Amici* Council Br., 9. This charge has

been rejected by this Court. *Meyer v. Grant*, 486 U.S. at 421-422 & n. 4 ("This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.").

This position is also incorrect in light of modern initiative practice. The reason people like to sign initiative petitions is because they – individually and personally – are "empowered." Initiatives are "direct democracy" – an opportunity to express a desire for political change. 486 U.S. at 423.

Amicus NVO has observed this impulse first-hand more than 18 million times. Yet in virtually every instance, the circulator must first explain to a prospective signer that the petition is for an initiative and what the initiative does. *Id.*

Most of these conversations are brief.[17] Yet a failure of "the luxury of discussing meaningful aspects of the initiative proposal," *Amici* Council Br., 9, does not diminish the First Amendment protections afforded the briefer speech. The First Amendment protects the guttural dissent as well as lofty intellectualism. *Cohen v. California*, 403 U.S. 15, 26 (1971)(protecting a "single four-letter expletive").

In addition, *amici* ignore the language of the petition itself. Every petition states "Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the

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[17] "Here, sign this. It will really p__s off [California Governor] Pete Wilson." Howe, May 19, 1998.

summary of an initiated measure in its entirety and understand its meaning." Jt. App. 20, 23, 28, 30. This Court has found this warning to signers one of several protections which "seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition". *Meyer v. Grant*, 486 U.S. at 427.

Similarly *amici* States of Washington, *et al.*, focus on the content of circulators' speech when they say "whether a circulator is paid or volunteer is also important information that may affect some voters' decisions about whether to sign a petition." *Amici* Brief of States of Washington, *et al.*, 22.

So long as paid petition circulation is lawful and necessary to place most initiatives on the ballot, what does it benefit the voters to know that a circulator is paid? There is no connection between the pay of the circulators and the subject of the initiative.

Nor is the badge any advantage to voters. The badge a circulator must wear in Colorado states the circulator's name, and includes the phrase "PAID CIRCULATOR in bold-faced type which is clearly legible" and the name and telephone number of the "individual employing the circulator." C.R.S. § 1-40-112(b). Circulators are usually independent contractors, paid by a manager, who is not either the proponent or the initiative's financial backers; for example, in most cases, the badge will not even identify Amicus NVO (much less the initiative proponent) as the entity which hires the manager.

Any benefit to voters from disclosure of information will usually come from identifying financial backers of the initiative, and that

identification is not done by the circulator's badge or monthly reports.[18] So the only information the badge provides the voters is the circulator's name and that the circulator is paid. The circulator's name is protected by this Court's deference to anonymous political speech; petition circulation is the kind of individualized personal speech which warrants the protection of anonymity. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).[19]

Disclosing that the circulator is paid shows only the State's own distaste for paid circulation. If the State dislikes paid circulators, it should say so itself, not force private circulators to carry its message.

The reports Petitioner requires of circulators are subject to the same objections. The monthly report, in particular, represents the State's effort to force

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[18] In the recent battle over California's "English for the Children" initiative Proposition 227 to require children to be taught English, disclosure reports indicated that the principal financial backer of the opponents was the owner of a Spanish-language broadcast interest. Garcia, "Spanish-TV Mogul Funds Prop. 227 Foes," *The Sacramento Bee*, May 22, 1998, A4. None of this information would have been disclosed by a circulator's badge or report.

[19] Petitioner and *amici* argue that circulators have been deputized by the State and that this obviates *McIntyre*'s protection. *See, e.g., Amici* Brief of States of Washington, *et al.*, 19. As shown above, however, circulators are private citizens, not state actors. *Amici* claim that circulators cannot change petition texts and thus are not like handbill authors, *id.*, but the protection afforded circulators is not for the text of the petition. Their political speech is both their conversations with likely signers and their actions in circulating the petitions themselves. *Meyer v. Grant*, 486 U.S. at 421-22.

political speech at a point when the initiative itself may never become part of the Colorado electoral process. Petitioner's confusion on this point is most evident when she complains that

> the Tenth Circuit did not explain why it is acceptable to require a petition circulator to disclose his or her name and address as part of an affidavit filed with the Secretary of State with the petition, but improper to require the same disclosure in a report filed with the Secretary of State at the same time.

Pet. Br., 43.

Although *amicus* NVO does not support the affidavit requirement for circulators (because it is an empty gesture in today's initiative process), the simple answer is that, under Colorado law, the petition becomes "election material" only when it is qualified for the ballot. C.R.S. § 1-40-114. Reports applicable to a time when the petition is "purely private speech," *Delgado*, 861 F.2d at 1497 n. 7, and "an individual right solely for the circulator and not for the state," *Montero*, 861 F.2d at 609, should be subject to strict scrutiny. These reports add nothing to the political debate and inject the State into political discussions through speech limitation, rather than by its own government speech. *Cf., Duke v. Cleland*, 5 F.3d 1399, 1403 (11th Cir. 1993)(contrasting *Delgado* with the situation where the actor "is a creature of state law and its actions are attributable to the state.").

And the requirement that a circulator be a registered elector succumbs to the same logic. As Petitioner says, "the addition of the minimal

requirement that voters and circulators register to vote" is a "small thing taken away from them." Pet. Br., 35. Yet even a "small thing taken away" in exchange for suppression of core political speech may violate the First Amendment. The voter registration requirement mutes the speech of hundreds of thousands of Coloradans and acts as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *United States v. National Treasury Employees Union*, __ U.S. __, __, 115 S.Ct. 1003, 1013 (1995)(restriction on compensation for off-the-job expression violates speech rights of government employees).

The Eighth Circuit recently rejected a similar requirement that circulators be registered voters:

> in no other situation does Nebraska law prohibit or restrict Nebraskans who advocate or oppose electoral measures from hiring or recruiting non-registered voters to champion their cause, including hiring non-registered lobbyists, non-registered campaign workers or campaign managers, or non-registered persons to run a telephone bank opposing various initiatives.

Bernbeck v. Moore, 126 F.3d 1114, 1117 (8th Cir. 1997); *see also, Term Limits Leadership Council*, 984 F.Supp. at 475 (striking qualified elector requirement for circulators).

The State has done enough to protect its citizens from the "dangers" of paid circulators. It has passed laws and vigorously defended them. It warns every signer to read and understand the initiative before signing. C.R.S. § 1-40-106.

Voters have the right to make "ill-advised choices." *Brown v. Hartlage*, 456 U.S. at 60 ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."). The State's remedy if it disagrees is to speak itself, and convince voters of the wisdom of its views, not to compel circulators to speak or restrict their First Amendment rights, and not to negate voters' advocacy of political change by discarding their signatures where they made a choice the State considers "ill-advised."

What the State cannot do, and what it has done here, is to force speech in violation of the First Amendment. The badge, registration and reporting requirements for circulators are beyond the State's power under the First Amendment.

C) Petitioner's Regulations Cannot Be Justified As A Means To Avoid Fraud:

Nor can Petitioner's regulations be justified on the basis of avoiding fraud by circulators, since their real effect falls on voters' core political speech and alternative methods are available to avoid real fraud.

To restrict core political speech, the government must demonstrate a substantial need. There was no evidence that petition circulators in Colorado have engaged in significant instances of fraud which could be eliminated by the badge, residence and other regulations at issue here, yet that specific evidence

would be required to restrict speech.[20] *Meyer v. Grant*, 486 U.S. at 427-28; *see, also, Limit v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994); *Term Limits Leadership Council*, 984 F.Supp. at 472-75.

As the Court noted in *Meyer v. Grant*, the risk of fraud is minimized at the petition circulation stage. 486 U.S. at 427; *Bernbeck v. Moore*, 126 F.3d at 1117 (same). The Court found Colorado's "arsenal of safeguards to protect against the danger of signature fraud," *id.*, was adequate to the task without restricting core political speech. 486 U.S. at 427. Those laws have not been weakened since *Meyer*.

Nor can Petitioner claim that professional petition circulators represent a significantly greater risk of fraud than any other political speaker. This Court expressly rejected that idea in *Meyer*:

> we are not prepared to assume that a professional circulator – whose qualifications for similar future assignments may well depend on a reputation for competence and integrity – is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

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[20] The frauds described in Petitioner's and *amici*'s briefs included: "obfuscation" by the placement of competing propositions on the ballot, Pet. Br. 20, a "higher percentage of invalid signatures" by paid circulators than volunteers, Pet. Br. 22 (comparing signatures in Florida on a casino gambling initiative against the "Save Our Sealife" ban on gill-netting), and a circulator paid for several thousand signatures she had not collected. *Amici* Brief of States of Washington, *et al.*, 4. Yet none of these frauds would have been prevented by the regulations at issue here.

486 U.S. at 426.

The district courts in *Limit v. Maleng*, 874 F.Supp. 1138 (W.D. Wash. 1994) and *Term Limits Leadership Council, Inc. v. Clark*, 984 F.Supp. 470 (S.D. Miss. 1997) both found no evidence of fraud caused by non-registered circulators. In fact, the district court in *Limit* found that the rate of signature invalidity was greater for volunteers than for professional circulators. 874 F.Supp. at 1140 n. 3.

Amicus NVO, as a business practice, guarantees that at least 70% of the signatures collected will be valid, or it will collect more signatures at no cost to the client. Similarly, NVO will not pay its circulators for any signatures unless the circulator achieves an 75% validity rate for collected signatures. NVO and its circulators thus have powerful economic incentives to provide only valid signatures.

It would be strange to permit Colorado to argue now what was unavailing in *Meyer*: that paid professional circulators are so prone to fraud and abuse that the regulations which were adequate to prevent fraud then are now not up to the task.

D) Petitioner's Regulations Cannot Be Justified On the Basis of Assisting Voters Because They Harm the Voters Without Any Commensurate Benefit To the Initiative Process:

Nor can Colorado justify its speech regulations on the basis that they protect voters, because their only effect is to suppress speech among voters. If circulators fail to wear their badges, turn in their

reports, or register to vote, all signatures collected by those circulators are discarded. C.R.S. § 1-40-113(1).

The signatures, like the circulators' actions, are not voting, *Montero*, 861 F.2d at 607 ("signing of an initiated petition is not 'voting.'"), subject to the State's power to regulate elections. Instead, signers, like circulators, "seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment." *Meyer v. Grant*, 486 U.S. at 421.

Although the State need not listen to an "individual's communication on public issues, that is because the individual's remedy is "to be registered principally at the polls." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1984). But here the State is closing off the ballot box as well as the speech, and the logic does not apply:

> Where petitions have been invalidated because of the failure of the person circulating the petition to comply with the laws, the reasoning generally seems to be that the omission raises doubts as to the validity of the signatures themselves.

Citizens Against Legalized Gambling v. D.C. Board of Elections and Ethics, 501 F.Supp. 786, 790 (D.D.C. 1980)(citations omitted).

Aside from an "ill-advised choice" by the voters – a ground forbidden to the State, *Brown v. Hartlage*, 456 U.S. at 60 – the failure to wear a badge, register to vote or file a monthly report do not raise doubt as to the validity of the signatures. Since Colorado has all the information it needs to verify these signatures,

and since the effect of the three regulations is solely on core political speech, and not on the validity of the signatures, Petitioner should not limit the signers' political speech by discarding their signatures. "To deny the persons who signed these petitioners the chance to have those signatures count – solely because of misconduct by others that does not cast doubt on the signatures themselves – would force this Court to stand on form over substance." *Citizens Against Legalized Gambling*, 501 F.Supp. at 790.

Even if Petitioner could justify her regulation of circulators' conduct, she should not be permitted to cut off innocent third-parties' First Amendment rights without showing that such speech restrictions are the narrowest possible. She has not made such a showing; in fact, she has made no showing at all concerning the rights of third parties.

Thus, Petitioner's regulations are not compelling, rational, or narrowly tailored; they should not stand.

CONCLUSION

For the reasons noted, Petitioner's regulations should be struck down, and the lower court upheld.

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